Supreme Court, U.S.
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No. 99-1840

In The
Supreme Court of the United States

CAROL ANN LEVINE,
PETITIONER,
v.
REGENTS OF THE UNIVERSITY OF CALIFORNIA, ET AL.,
RESPONDENTS.

On Petition for a Writ of Certiorari
To The California Court of Appeal
For the First Appellate District, Division Two

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the California Court of Appeal's unpublished decision correctly affirmed the trial court's judgment dismissing Petitioner's fifth amended complaint after sustaining Respondents' demurrer, where Petitioner:

(1) improperly attempted to plead around prior inconsistent allegations;

(2) alleged only vague claims of sexual harassment that purportedly spanned twenty years, and the applicable statute of limitations limited recovery to only the end of this period; and

(3) failed to allege facts that could give rise to any actionable professional relationship during the relevant period, where California law requires the existence of such a relationship as a predicate to liability under Petitioner's various legal theories.

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PRELIMINARY STATEMENT

This Court exercises discretion to grant a petition for certiorari only when motivated by "special and important reasons." S. Ct. R. 10.1. No such reasons exist here.

Petitioner Carol Ann Levine hyperbolically asserts that the unpublished decision of the California Court of Appeal, First Appellate District, Division Two sets a "dangerous precedent" that encourages sexual harassment and impairs women's rights in the university setting. But apart from correctly resolving the parties' dispute, that decision does not unsettle or create any conflict of law, does not raise any constitutional concerns, and is of no interest to anyone except the parties involved.

Indeed, this unpublished court of appeal decision – like all such unpublished decisions – has no bearing on future cases or the development of the law – and is not even citable precedent outside the confines of this dispute. *See* Cal. R. Ct. 977(a). Moreover, the lower courts fully considered and correctly decided all issues below, properly applying California law to the record and finding Petitioner's fifth amended complaint lacking any arguable theory on which she could or should proceed. Respondents respectfully request that this Court deny the petition for writ of certiorari.

STATEMENT OF THE CASE

Respondents caution the Court not to rely on Petitioner's unsupported background statement [Pet. 3-5] in evaluating her claims because Petitioner (a non-attorney who has filed the petition in pro per) offers a factual story that strays far beyond the established record. Indeed, the only record citations in her statement of facts refer to Petitioner's Appendices D and E. These Appendices consist entirely of materials never presented to any court below. Respondents thus ask this Court to look to the Court of Appeal's focused recitation of the facts and procedural history [App. B at 2-3] as its guide in evaluating the petition rather than to Petitioner's unsupported factual statement.

Briefly stated, Petitioner alleges that while she was a student at the Berkeley campus of the University of California, a University history professor sexually harassed her beginning sometime in the mid-1970's until the end of March 1995. But several factors make Petitioner's case unusual, not the least of which was that during most of this 20-year period – including the only years not barred by the applicable statute of limitations – she was not a registered student, not a University employee, and not an applicant for University employment. Her failure to establish membership in at least one of these categories doomed her claims as a matter of California law.

Indeed, Petitioner tried unsuccessfully – six times – to state a viable cause of action in the Alameda County Superior Court. But, as the Court of Appeal found, her final operative complaint was "remarkably vague" and suffered from a variety of defects, including the inclusion of allegations that were inconsistent with her prior pleadings. (App. B at 2) After repeatedly sustaining demurrers and giving Petitioner an opportunity to amend, the trial court sustained the University's last demurrer – without leave to amend as to most of Petitioner's claims, and with leave to amend as to the remainder. When Petitioner refused to amend, the trial court dismissed her lawsuit and entered a judgment in Respondents' favor. The Court of Appeal affirmed and the California Supreme Court declined to grant review.

REASONS THE PETITION SHOULD BE DENIED

A. Petitioner Cannot Transform Her State-Based Statutory Sexual Harassment Claim Into An Action For A Violation Of Her Constitutional Rights

Despite six attempts, Petitioner could not plead the necessary allegations for a viable lawsuit. When her claims for sexual harassment under California's civil rights and fair employment statutes failed, she tried to assert the same claims in different ways – expanding her final operative complaint to eleven causes of action – including recourse to an inapplicable California "hate

crimes" statute that is designed to protect constitutional rights.

Petitioner continues that approach here, trying to attract this Court's attention by arguing that the Court of Appeal has robbed all University students of their constitutional rights. But the Court of Appeal has done no such thing. Its decision merely focuses on the unique allegations and inconsistencies in *Petitioner's* various complaints and, finding them lacking any basis on which a claim can be stated, upholds the dismissal of Petitioner's lawsuit in an unpublished opinion. The decision thus has no broad application to students or other individuals who make claims of sexual harassment in the educational setting. Nor does the decision prevent students from invoking any of California's laws designed to prevent and redress sexual harassment. Petitioner's inability to adequately plead a case simply says nothing about such claims in general.

B. California's Bane Act Has No Application To Petitioner's Sexual Harassment Allegations

Petitioner argues that the Court of Appeal erred in denying her protection under California's Tom Bane Civil Rights Act, California Civil Code section 52.1. Petitioner is wrong because the Bane Act does not afford her any protection for the alleged wrongs Respondents purportedly committed against her.

California's Bane Act is a hate crime statute designed to protect against civil rights violations in that context. *Jones v. Kmart Corp.*, 17 Cal. 4th 329, 338 (1995); *BART Dist. v. Superior Ct.*, 38 Cal. App. 4th 141, 144 (1995). Hate crime statutes "proscribe an especially egregious type of conduct – that of selecting crime victims on the basis of race, color, religion, ancestry, national origin or sexual orientation." *In re Joshua H.*, 13 Cal. App. 4th 1734, 1739 (1993).

Although the Bane Act appears to impose liability on any individual for interfering with any other individual's civil rights by threat or intimidation, California courts have construed the Act narrowly in light of its "specialized purpose" of deterring hate crimes. *See* Gail Donoghue & Jonathan I. Edelstein, *Life After Brown: The Future of State Constitutional Tort Actions in New York*, 42 N.Y.L. SCH. L. REV. 447, 552-53 (1998). Under this construction, the courts read the statute in conjunction with related statues and require a plaintiff to plead and prove "a specific intent to deprive a person of a defined constitutional or statutory 'right' on account of the person's status as a member of a protected class." *Joshua H.*, 13 Cal. App. 4th at 1741; *In re M.S.*, 10 Cal. 4th 698, 713 n.5 (1995); *Boccato v. City of Hermosa Beach*, 29 Cal. App. 4th 1797, 1809 (1994).

Here, Petitioner argues that alleged sexual harassment by a University professor interfered with her right to free speech and right to freedom from harassment. The free speech claim arises from her

allegation that the professor threatened her with adverse repercussions if she exposed the alleged harassment. (Pet. i, 2) Thus, under her theory, any pressure not to "tell on someone" becomes a constitutional violation that can be remedied under a hate crime statute like California Civil Code section 52.1.

Petitioner's Bane Act allegation had numerous problems. But her allegations did not fit the hate crime profile that typically involves prejudice-based violence on innocent strangers. *Joshua H.,* 13 Cal. App. 4th at 1749 n.9. Her case was not about an impersonal attack motivated by prejudice. Rather, she alleged one-on-one contact with a University professor who purportedly shared a close working relationship with Petitioner and an "interference" with her rights that arose from a *personal* bias against her – not because she happened to be a woman. Petitioner's inability to connect the alleged harassment to her membership in a protected group doomed her Bane Act claim, as the Court of Appeal held.

The Court of Appeal's unpublished decision in Petitioner's case does not deprive University students or any other Californian of the Bane Act's protections. Nor does it violate Petitioner's federal constitutional rights. It simply held that the Bane Act had no place in Petitioner's sexual harassment lawsuit. That holding raises no issue worthy of national review.

C. The Court Of Appeal's Dismissal Of Petitioner's Emotional Distress Claim Raises No Issue Worthy Of Review

In addition to claiming that sexual harassment automatically qualifies as a hate crime under California's Bane Act, Petitioner asserts that such harassment automatically qualifies as common law intentional infliction of emotional distress (IIED). She argues that the trial court erroneously dismissed her IIED claim because, as a matter of California law, her sexual harassment allegations necessarily sufficed to state a viable claim under that cause of action. (Pet. 7)

But the Court of Appeal never undertook such an analysis. Instead, it noted merely that her complaint never specified what allegedly "outrageous" acts occurred within the narrow six-month period during which actionable intentional infliction purportedly occurred (*i.e.*, from September 1994, the earliest non-time-barred acts would be actionable, to March 1995, when her relationship with the University professor ended). (App. B at 26) Moreover, Petitioner has no legal support for her assertion that sexual harassment suits necessarily encompass IIED. To the contrary, while California's sexual harassment law extends to a wide variety of offensive acts, California narrowly limits IIED actions to outrageous conduct that causes severe emotional distress. (*Id.*) Thus, while a given act *may* constitute both harassment and IIED, that is not always

the case. In other words, California law does not require absolute congruence between these two causes of action.

In any event, how California defines its common law- and statutory-based torts is not properly a matter for this Court's attention. 28 U.S.C. § 1257(a). That alone is grounds for denying the petition.

D. The Court Of Appeal's Application Of California's "Sham Pleading" Doctrine Raises No Issue Worthy Of Review

Finally, Petitioner objects to the way the trial court and Court of Appeal applied California's "sham pleading doctrine" to her complaint. The lower courts noted how her fifth amended complaint contained new factual allegations that contradicted her earlier amended complaints; it was on that basis that the courts discounted her latest pleading. (App. B at 19-20)

Petitioner argues that the Court of Appeal erred in failing to permit her to correct mistaken allegations in her previous pleadings. (Pet. 7-8) But to the extent that her prior allegations were inconsistent with her operative complaint, she had to account for that discrepancy in the trial court (and to explain to the Court of Appeal why that discrepancy warranted a reversal). She failed to do so. (App. B at 21-22) Instead, in her last (and operative complaint), she carefully pled around defects rather than correcting the errors in her previous complaints, omitting

significant factual detail that was present in her previous (and superseded) pleadings.

The clearest explanation for her "suspicious change in facts" was an attempt to supplant previous detailed pleadings with vague allegations to avoid fatal pleading deficiencies. (App. B at 15) For example, her last complaint alleged an eligibility for University employment, even though her earlier allegations made clear that her unregistered status meant that she was not qualified for such employment [*id.* at 13]; she attempted to add new facts to support new causes of action [*id.* at 21-22]; and she failed to provide the specific allegations necessary for fraud and other new claims [*id.* at 23]. Both the trial court and the Court of Appeal properly called Petitioner on her "sandbagging" tactics. (*Id.* at 22)

None of Petitioner's alarmist rhetoric implicates this Court's review of that analysis. Indeed, this issue is simply a matter of state law and state pleading rules, not properly a subject of Supreme Court review.

CONCLUSION

The California Court of Appeal correctly rejected Petitioner's claims that she be permitted to continue her lawsuit. Its unpublished decision neither addresses nor involves any substantial questions of law, nor does it resolve any important issues that require review by this Court. No aspect of this case is noteworthy and its facts

and procedural posture are so unusual that no other court is likely to face a similar situation.

In sum, this is and was a simple case of faulty pleading on a record that fails to sustain any alleged invasions of Petitioner's constitutional rights. Its very uniqueness should preclude review. The parties and judicial system already have invested far more resources examining this matter than should ever have been incurred. The Court should therefore deny Petitioner's petition for a writ of certiorari.

Dated: June 16, 2000.

Respectfully submitted,

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Appendix[1]

had argued, that the sham pleading doctrine allowed the court to disregard allegations of a denied application for a job for which Levine was qualified.

In ruling, the court was not confined to the allegations of the verified fifth amended complaint. It "was entitled to consider the verified allegations of the earlier complaint[s]. [Citations.] Allegations of fact made under oath may not ordinarily be dropped without adequate explanation merely for the purpose of avoiding their harmful effect in a subsequent pleading. [Citations.]" (*Sackett* v. *Wyatt* (1973) 32 Cal.App.3d 592, 597.) The rule applies where a party has "file[d] an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If [s]he fails to do so the court may disregard the inconsistent allegations and read into the

[1] Petitioner's Appendix B at pages 12-13 (between center headings "10" and "11") is missing a page from the unpublished decision of California Court of Appeal, and instead erroneously includes a page from Respondent's Answer to Petitioner's petition for review by the California Supreme Court. This Appendix supplies the Court with that missing page.

amended complaint the allegations of the superseded complaint. [Citations.]" (*Owens* v. *Kings Supermarket, supra,* 198 Cal.App.3d 379, 384.)

Part of Levine's burden under the FEHA was to plead that she applied for and was denied a job *for which she was qualified.* (*Levy* v. *Regents of University of California* (1988) 199 Cal.App.3d 1334, 1343; *Ibarbia* v. *Regents of University of California* (1987) 191 Cal.App.3d 1318, 1327.) In her latest complaint, she alleged, albeit in conclusory language without specifying any particular job, that in addition to being an applicant for readmission as a registered graduate student, she was "an applicant for related employment positions available to graduate students, including non-registered graduate students, at UC Berkeley." Her need to be qualified as a "non-registered" student was crucial because her pleading also indicated that she lost her "registered" status and, beginning in the summer of 1982, began applying for "readmission as a registered graduate student. . . ."

Levine had been trying to allege discriminatory hiring under FEHA since her original complaint, but her current complaint (a short-lived fourth amended complaint